No. 93-418

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SOUTHERN TIMBER PURCHASERS COUNCIL, HANKINS LUMBER COMPANY, INC., HOOD INDUSTRIES, INC. and HUNT PLYWOOD COMPANY, INC.,
Petitioners,

v.

MARVIN C. MEIER, Acting Regional Forester, U.S. Forest Service; JACK WARD THOMAS, Chief, U.S. Forest Service; JAMES W. PULLIAM, Regional Director, U.S. Fish and Wildlife Service; BRUCE BABBITT, Secretary of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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1. The court of appeals held that petitioners did not have standing to complain about the Forest Service decision limiting the timber they could harvest under their existing contracts or would be permitted to harvest in the near future. *See* Pet. App. A. That issue was briefed, argued, and addressed by the court below. As demonstrated in the petition, that issue is of substantial importance and is inconsistent with this Court's precedents and the weight of authority from other jurisdictions.

As its lead argument in opposition, the Government urges that "there is no reason for this Court to consider" the standing issue because petitioner's claims are moot—indeed were moot at the time of the district court's 1991 merits opinion (Pet. App. B) and of the Eleventh Circuit's 1993 decision on standing. The Government's theory is that any challenge to the 1989 red-cockaded woodpecker policy ("1989 Policy") is moot because that Policy was superseded in 1990 by another set of woodpecker management guidelines ("1990 Guidelines"). Opp. at 12-16. Thus, the Government apparently would have the decision of the court below escape review—and thus remain in effect to foreclose timber industry participation in suits affecting the amount of timber the Forest Service will allow to be harvested.

There is little merit to the Government's mootness point.[1] The district court twice rejected it, finding that

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[1] The Government would have this Court reject the district court's reasoning on the theory that cases involving short-term orders are "capable of repetition" only if plaintiff shows he will again be subjected to the same substantive order. Opp. at 15-16. This Court has recently rejected the argument that a plaintiff must show that the "selfsame" action will recur. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, —— U.S. ——, 113 S. Ct. 2297, 2301 (1993). A plaintiff need only show a likelihood that he "will again be wronged in a similar way." *Honig v. Doe*, 484 U.S. 305, 323 (1988); *see id.* at 318-22 and n.6.

The district court properly applied the "capable of repetition" exception. The focus of petitioners' claim was the agency's position that before implementing interim policies which alter forest plans, the agency was not required to comply with the National Forest Management Act's procedures for significant plan amendments. The district court correctly found that the use of this procedural shortcut for interim policies, which was the subject of the challenge to the 1989 Policy, was likely to recur; indeed, it had already recurred in the inadequate procedures employed in adopting the 1990 Guidelines. Pet. App. at 58a and 71a. An "interim" order is by nature only temporary, and thus the challenge plainly fell within the exception for legal challenges capable of repetition yet evading review. The district court's determination that the situation was likely to recur has been confirmed by the agency's subsequent

the substitution of a similar policy had not fully eradicated the harmful effects of the 1989 Policy and that the temporary Policy met the exception for short-term orders capable of repetition, yet evading judicial review. Pet. App. at 57a-58a, 70a-71a.

The Government did *not* contest the district court's mootness decision in the court of appeals. The Government did *not* identify it as an issue on appeal or discuss it in its briefs.[2] The Government's decision to abandon the issue in the Eleventh Circuit, only to resurrect it here, suggests either that the Government's asserted confidence in the mootness argument is new-found, or that the Government made a strategic decision not to raise the point in the court of appeals in the hope of obtaining broad ruling from that court on standing or the merits, while holding "mootness" in reserve for an occasion such as this, in an effort to make certiorari less attractive.

The district court's rejection of the mootness argument, and the Government's failure to raise the issue below, may

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issuance of other interim policies without following the procedures required for significant plan amendments. *E.g.*, 58 Fed. Reg. 62910 (Dec. 3, 1993) and 56 Fed. Reg. 28853 (June 25, 1991) (interim guidelines for management of northern goshawk habitat); 58 Fed. Reg. 5353 (Jan. 21, 1993) (interim guidelines for managing California spotted owl habitat); 55 Fed. Reg. 23255 (June 7, 1990) (interim guidelines for managing red-cockaded woodpecker habitat).

The Government chides petitioners for not having sought judicial review of the administrative decision on 1990 Guidelines. Opp. at 10. But such a challenge would be unlikely to succeed so long as the Eleventh Circuit's decision on standing (and the district court's as-yet unreviewed merits decision (Pet. App. B)) remain in effect.

[2] Somewhat misleadingly, the Government blandly asserts that the court of appeals failed to "address" the mootness issue. Opp. at 13 n.1. Although the Government says that it is "informed" that the issue was raised at oral argument, our recollections are to the contrary. If it was raised it was only in passing in response to questions from the court and was not part of any affirmative argument by Government counsel. It was not raised at all by the Government in its briefs.

well bar the Government from presenting it here, at least at this time. Although jurisdictional in part, mootness has been regarded as a prudential doctrine, subject to the exercise of discretion by the Court. *See Franks v. Bowman,* 424 U.S. 747, 756 n.8 (1976) (mootness is not a constitutional doctrine); *Honig v. Doe,* 484 U.S. at 329-32 (Rehnquist, C.J., concurring) (mootness is prudential and not a constitutional, jurisdictional doctrine). Accordingly, the Government's abandonment of the argument below should influence the manner in which the Court approaches mootness at this time. It ought not dissuade the Court from granting the writ.

Despite the Government's contention here that the case is and was moot, the Government and other parties—and indeed the district courts—have not hesitated to rely upon the decision below to deny standing and intervention to members of the timber industry seeking to participate in suits affecting the timber supply from national forests.[3] It is plainly unfair for the Government to tell this Court that the Eleventh Circuit should not have reached standing because the case was moot, and yet to rely on the Eleventh Circuit's standing decision in other forums. *See* Wright, Miller and Cooper, 13A *Federal Practice And Procedure* § 3533.10 at pages 433-35 (1984) (unfair to deny

[3] At least two courts have cited the Eleventh Circuit's opinion in concluding that the timber industry lacks standing to bring claims against federal agencies asserting violations of the Endangered Species Act and the National Forest Management Act. *Forest Conservation Council v. Espy,* —— F. Supp. ——, 1993 WL 441668 at *18 (D. Id. Oct. 28, 1993); *Wind River Multiple-Use Advocates v. Espy,* —— F. Supp. ——, 1993 WL 439727 at *6 (D. Wyo. Oct. 29, 1993). Additionally, in November 1993 filings in three cases, the Government defendants and environmental group plaintiffs cited *Region 8* as supporting their position that timber industry representatives should be denied *intervention* in cases raising Endangered Species Act and timber supply issues. *See* briefs opposing intervention in *Idaho Conservation League v. Caswell,* No. 93-0280-E-HLR (D. Id.); *Greater Yellowstone Coalition v. Robertson,* No. 93-0303-E-HLR (D. Id.); *Sierra Club v. Garber,* No. CV-93-069-BU-RWA (D. Mont.).

certiorari based on a mootness argument). At least where the petition has apparent merit, this Court has declined simply to leave precedent created in such circumstances in place. *See* Stern, Gressman, and Shapiro, *Supreme Court Practice* 287-88, 722-23 (6th ed. 1986). The decision of the court below should not be permitted to stand. It should either be reversed on the standing principles it enunciates or vacated on grounds of mootness.

While petitioners have *not* found a case presenting precisely the same elements as this one—(1) a jurisdictional issue such as standing, which is the subject of the petition; (2) a claim of mootness considered and *rejected* by the district court; and (3) a failure by the Government to assert mootness in the court of appeals—several dispositions are possible:

(a) The Court can decline to address the Government's mootness point, finding it not properly poised for decision at this time, or perhaps waived. The Court may, therefore, grant the Petition and limit its review to the standing issue actually addressed by the court below. It can, of course, do so by granting full consideration with oral argument or by way of summary reversal.[4] If the decision below is reversed (and this Court has not disposed of the mootness argument), the court of appeals may consider mootness and the merits on remand.

This approach commends itself if constitutional standing issues are deemed to be logically prior to mootness issues, or even if standing and mootness are deemed to be jurisdictional issues of approximately equal dignity. There is precedent for this Court considering one jurisdictional issue properly presented for review, while recognizing that a second jurisdictional problem may have to be considered on remand. *See Patsy v. Board of Regents of the State of*

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[4] We, of course, recognize that summary reversal is unusual. However, we believe that we have presented a clear basis for a summary reversal on standing due to the clear conflict between the decision below and *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

Florida, 457 U.S. 496, 515-16 n.19 (opinion of the court directing remand) and 529 (Powell, J., dissenting, because "this Court remands the issue of its own jurisdiction to the courts below") (1982); Stern and Gressman at 288 ("the Court may remand the case to the lower court for consideration of the possibility of mootness"). In the course of a single case, courts frequently have occasion to consider and address, in a series of separate rulings, a number of jurisdictional challenges.

(b) This Court could grant the Petition and consider not only the standing questions presented in the Petition, but also the question of mootness raised by the Government, notwithstanding that the Government did not raise it below.

(c) The Court can grant the Petition, vacate the judgment, and remand to the court of appeals for consideration of the government's mootness argument.[5] Remanding *without* vacating the decision, or otherwise leaving the judgment below intact, would allow the respondent here to profit by having failed to present an argument to the court of appeals that (if it believed it had merit) it should have presented to that court.

2. a. With respect to standing—the subject of the petition—the Government does little to dispute the inconsistency between the decision below and the decisions of this Court and the several circuits cited in the petition. Those cases have allowed government contractors to maintain suit in the district court to set aside unlawful agency action pursuant to the Administrative Procedure Act ("APA"), notwithstanding the possibility of contractual

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[5] If this Court were actually to find the case moot, the proper course would presumably be to vacate the decision of the court below on standing. Even where a case "has become moot while on its way here," it continues to be the "established practice of the Court" to "vacate the judgment below." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see, e.g., Yellow Freight System, Inc. v. United States*, —— U.S. ——, 113 S. Ct. 31 (1992).

remedies in the Court of Federal Claims. *Compare* Pet. at 11-18 *with* Opp. at 16-20. The Government dismisses the existence of a conflict with those cases by observing that those cases did not focus on "standing."

To be sure, most of those decisions did not inject "standing" into the analysis. This is not surprising because (as described in the Petition) the question is at bottom about the respective jurisdictions of the district courts and the Court of Federal Claims over APA claims. It is not really a question of standing at all. By reaching the merits in each of the cases cited in the Petition at 16-17, these courts implicitly approved plaintiffs' "standing." Those cases and the Court's decision in *Bowen* were improperly decided if the opinion of the court below is correct.

b. The Government (Opp. at 18-19) relies on the Contracts Disputes Act as perhaps distinguishing this case. The Contract Disputes Act was mentioned below only in passing. *See* Pet. App. 13a-14a. It is likely that it was applicable to most of the cases cited in the petition originating after passage of the 1978 Act. Indeed, at least one of the cases cited in the petition, *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1486 (9th Cir. 1985), expressly addressed the Government's Contract Disputes Act theory, applied it to timber contracts, and held that it does *not* bar a timber company from bringing claims in district court "based upon extra-contractual statutory obligations." [6]

The Government theorizes that even though the timber contract appears to give the Government a right to modify

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[6] The Contract Disputes Act requires a contracting party to take certain claims involving the contract to the contracting officer, and then appeal the contracting officer's determinations to either a board of contract appeals or the Court of Federal Claims. *See* 41 U.S.C. §§ 601-12, Pet. App. 137a-47a. The Government does not suggest that Congress wished to channel APA review of statutory and constitutional claims to contracting officers and boards of contract appeals.

the contract to provide additional protection for an endangered species, petitioners' claim, when "properly viewed," was really for breach in that the Forest Service relied on an "illegally adopted policy as the basis for contract modification." Opp. at 19. The Government then argues that an action under this breach of contract theory before the contracting officer and then either the board of contract appeals or Court of Federal Claims would constitute an "adequate alternative remedy" precluding district court review under the APA, 5 U.S.C. § 704.

Not only has the existence of contractual remedies been held irrelevant in the various court of appeals cases cited in the petition, but this Court fully addressed and rejected the Government's § 704 argument in *Bowen v. Massachusetts,* 487 U.S. 879 (1988). This Court held that such an "interpretation of § 704 should be rejected because the [monetary] remedy available in the Claims Court is not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA" as only the district court could grant "declaratory or injunctive relief." 487 U.S. at 904-05. *Bowen* is dispositive of this case.

3. Finally, the Government argues that the Eleventh Circuit properly found that the Policy had only a "speculative" effect on the amount of timber that would be made available in the immediate future. Opp. at 20-24. The Eleventh Circuit so declared as an abstract conclusion of law. However, this Court's cases examine speculativeness as a factual matter. Here, the future economic injury was not speculative due to an admitted fact: the Government's Answer conceded that the 1989 Policy reduced the timber available for sale in 1989 and 1990 by 73 million board-feet. Pet. at 8, 19. Since the timber sale level projected in a forest plan is a "statement of intent" (Opp. at 3), it is not speculative to conclude that by adopting the new constraints in the 1989 Policy, the Forest Service reduced

the timber sale level it otherwise intended to offer, to the economic detriment of Council members who would have bid on and purchased this timber.

Where environmental groups are the plaintiffs, courts have frequently found that a forest "plan pre-determines the future" sufficiently to make injuries which depend on future timber sales not too speculative to confer standing to contest a forest plan. *See Resources Limited, Inc. v. Robertson*, —— F.3d ——, 1993 WL 442034 at *2 (9th Cir. Nov. 3, 1993) (describing three comparable cases where the Ninth Circuit found standing).[7] The conflict with the Ninth Circuit cases as respects this statutory scheme is clear, as is the broader conflict with other courts considering similar issues. Equally clear is the Eleventh Circuit's error in postulating speculativeness as a matter of law, rather than relying on the admitted fact that the unlawful policy reduced the amount of timber for harvest.

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[7] The Government's argument (Opp. at 22) that the injury to the then-future timber supply is no longer redressable because 1989 and 1990 have passed, would preclude standing in any case where the short-term order has lapsed. Yet, courts frequently reach the merits in short-term order cases. *See Honig*, 484 U.S. at 329-32 (Rehnquist, C.J., concurring); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). The Council's interest that the future timber supply not be reduced without following the procedures required by the National Forest Management Act and other law can still be redressed by a declaratory order specifying the agency's obligations under that Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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